United States Supreme Court

October Term, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

against

IPPOLITO-LUTZ, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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CITATIONS

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner respectfully prays that a writ of certiorari issue to review the final order of the Appellate Division, Third Judicial Department of the Supreme Court of the State of New York entered herein on July 1, 1975, affirming the order of the Supreme Court of the State of New York, entered on May 22, 1967, striking petitioner's answer to the complaint herein and directing that the respondent have judgment in the sum of $328,820.01, with interest, against the petitioner and also affirming the judgment entered upon such order. On November 20, 1975, the Court of Appeals of the State of New York denied petitioner's motion for leave to appeal from the aforementioned order of the Appellate Division, Third Judicial Department of the Supreme Court of the State of New York and said order became final.

OPINIONS BELOW

The order of the court below, upon which review is herein sought, was accompanied by a decision without opinion, reported at 48 A.D. 2d 1018, 373 N.Y.S. 2d 335 (App.-1*).

The order of the Supreme Court of the State of New York entered below was accompanied by an unreported memorandum opinion (App.-2).

Petitioner's motion for leave to appeal to the Court of Appeals of the State of New York was denied by order of that Court, without opinion.

JURISDICTION

The final order of the Appellate Division, Third Judicial Department of the Supreme Court of the State of New York was made and entered on July 1, 1975 (App.-4). A motion for leave to appeal from this order to the Court of Appeals of the State of New York was denied by an order entered on the 21st day of November, 1975 (App 6). The jurisdiction of this Court is invoked under Title 29 U.S.C. Section 1257(3).

* All references to App. are to the Appendix following the conclusion of this petition and to the page number thereof.

QUESTIONS PRESENTED

1. Where the trial court judge knew of an abortive **bona fide** attempt by petitioner to make proper disclosure to its adversary, did the invocation of the sanction of striking petitioner's entire responsive pleading, pursuant to Section 3126 of the Civil Practice Law and Rules of the State of New York for failure to make proper disclosure, violate petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States?

2. Where petitioner's responsive pleading set forth several independent affirmative defenses and counterclaims in addition to its general defense, did the Court's striking of the entire responsive pleading as a sanction for failure to make proper disclosure, violate the petitioner's right to due process of law under the Fourteenth Amendment to the Constitution of the United States in the absence of an inquiry or finding by the Court that the material and documents sought through discovery procedures were relevant to the affirmative defenses and counterclaims?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provision involved is Section One of the Fourteenth Amendment to the Constitution of the United States:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The principal statutory provision involved is Section 3126 of the Civil Practice Law and Rules of the State of New York (McKinney's Consolidated Laws of New York, Book 7B, CPLR 3101-3200, p. 639):

> Section 3126. Penalties for refusal to comply with order or to disclose.
>
> If any party, or a person who at the time a deposition is taken or an examination or inspection is made, is an officer, director, member, employee or agent of a party or otherwise under a party's control, refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed, the court may make such orders with regard to the failure or refusal as are just, among them:

> 1. an order that the issues to which the information is relevant shall be deemed resolved for purposes of the action in accordance with the claims of the party obtaining the order; or
>
> 2. an order prohibiting the disobedient party from supporting or opposing designated claims or defenses, from producing in evidence designated things or items of testimony, or from introducing any evidence of the physical, mental or blood condition sought to be determined, or from using certain witnesses; or
>
> 3. an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party.

STATEMENT OF THE CASE

Petitioner is a corporation organized under the Public Housing Law of the State of New York for the purpose of providing public housing in the City of Cohoes, New York.

On May 27th, 1960, petitioner and respondent entered into a contract whereby respondent agreed to furnish all the labor, materials, and equipment required for the general construction of Cohoes Housing Project NY 22-1 at Cohoes, New York.

In 1963 respondent commenced this action against petitioner, seeking money damages totalling $328,820.01 for breach of contract, retained percentage, extras and delay damages. A copy of the complaint is set forth at App.-7.

Petitioner's amended answer interposed a general denial, as well as seven affirmative defenses and two counterclaims. A copy of the amended answer is set forth at App.-9.

In November of 1966, respondent brought on a motion to invoke Section 3126 of the Civil Practice Law and Rules, striking the petitioner's answer for failure to comply with a prior order of the Supreme Court of the State of New York, directing petitioner to comply with a notice for discovery and inspection of certain documents. This motion was made returnable at a Special Term of the Supreme Court before Judge Pennock on December 9, 1966. On that date, petitioner's counsel appeared before the Court with all the documents of which discovery was sought. Up until the time they had received the notice of motion, petitioner's counsel had been unaware of the outstanding order as they had only recently assumed the duties of counsel for petitioner. Once aware of the outstanding order, petitioner's counsel had immediately taken steps to comply with the order. On appearing at Special Term on December 9, 1966, petitioner's counsel had available the documents sought through discovery. However, respondent's counsel did not appear in Court and petitioner was unable to transfer the documents at that time.

Judge Pennock reserved decision on respondent's motion. Decision was also reserved on a motion to set a date for an examination before trial of John F. Kelly, a former officer of the petitioner, who was reluctant to give a deposition.

In the ensuing weeks, petitioner's counsel attempted to arrange a date for the examination before trial, at which time the documents would be presented to respondent's counsel. Such a date could not be arranged. On May 8, 1967, Judge Pennock rendered an opinion setting May 22, 1967 as the time for the examination before trial. An order was made to this effect, and petitioner's counsel began preparations to present the voluminous documents for inspection at that time. However, on May 11, 1967, Judge Pennock rendered a decision upon the December 9, 1966 motion to strike the petitioner's answer for failure to comply with the order for discovery and inspection. The Judge ruled that respondent's motion was to be granted in its entirety and petitioner's answer was to be stricken.

Upon receipt of the Court's opinion, petitioner's counsel immediately went to Judge Pennock to request that he hear a motion for reargument of the motion. Counsel felt the action taken by Judge Pennock was too drastic and not in accord with New York case law on the invocation of Section 3126 penalties for failure to disclose. This case law is largely based on due process considerations. Petitioner's counsel expressed their opinion that, in light of their attempt to comply with the order for discovery on December 9, 1966 and their intent to produce the documents at the upcoming examination before trial, the Court's action was a denial of due process under both the New York and United States Constitutions. Judge Pennock refused to sign the submitted order to show cause for reargument. He then told counsel to produce Mr. Kelly on May 22, 1967 and to have all the records available. John F. Kelly was ordered to and did appear before Judge Pennock in open court on May 22, 1967

in the courthouse at Albany, New York, ready to submit to the examination before trial pursuant to the Court's decision. A hand truck, upon which the papers and records sought by respondents were loaded, was delivered outside the chambers of Judge Pennock. The matter of the examination before trial was called, and Judge Pennock, speaking from the bench, excused Mr. Kelly from further appearance and retired to chambers, where the motion to settle the order which struck the petitioner's answer was then undertaken. Once again, the Court was asked to reconsider petitioner's motion for reargument. The request was denied, whereupon Judge Pennock signed the order striking the answer of the Cohoes Housing Authority and allowing default judgment for the entire sum prayed for in the complaint to be entered (App.-14). An appeal was taken to the Appellate Division of the Supreme Court for the Third Judicial Department from the entry of the order striking the answer and from the judgment thereupon entered.

Upon appeal, petitioner argued that Judge Pennock erred, as a matter of law, in striking petitioner's answer under the attendant circumstances. In its argument, petitioner cited many New York Court decisions dealing with both the extent of power conferred by Section 3126 of the Civil Practice Law and Rules and the constitutional limitations on any such power. These two issues are inextricably related. The principal case cited by petitioner upon appeal was **Feingold** v. **Walworth Bros.**, 238 N.Y. 446, 144 N.E. 675. The questions certified for appeal in the **Feingold** case, **supra**, illustrate the ease with which the two issues are juxtaposed:

> "(1) Does an order made in this action, striking out the defendants' answer and granting judgment in favor of the plaintiff, violate section 6 of article 1 of the Constitution of the state of New York and the Fourteenth Amendment to the Constitution of the United States?

> (2) Is section 325 of the Civil Practice Act, in so far as it authorizes the court to strike out an answer and grant judgment in favor of the plaintiff, constitutional?
>
> (3) In this action to recover damages for fraudulent representations, where the answer not only contains denials of the alleged fraud, but in addition separate affirmative defenses of accord and satisfaction and general release under seal upon failure of the defendants to obey in part an order directing a discovery and inspection, does an order made pursuant to section 325 of the Civil Practice Act, striking out the answer and granting judgment in favor of the plaintiff, deprive the defendants of property without due process of law?
>
> (4) Did the facts in this case, as found by the Court, constitute as a matter of law 'a proper case' within the meaning of section 325 of the Civil Practice Act, for the making of an order striking out the answer and granting judgment in favor of the plaintiff?
>
> (5) Upon the facts in this case, as found by the court, was the court authorized to make an order striking out the answer and granting judgment in favor of the plaintiff?"
>
> 238 N.Y. at pp. 447-48

By specially citing the **Feingold** case as the principal case supporting their position upon appeal, petitioners raised the constitutional questions upon which petitioner seeks review. These questions permeate any discussion of the proper invocation of statutory power to strike a pleading on account of non-disclosure.

Statement of the Case

The Appellate Division for the Third Judicial Department of the Supreme Court of New York unanimously affirmed Judge Pennock's action in a decision rendered without opinion. It is this affirmance upon which petitioner seeks review by this Court.

Before it began seeking this remedy, however, petitioner sought to have the Appellate Division's determination reviewed by the New York State Court of Appeals. On motion for leave to appeal, petitioner cited the same issues as it had in the Appellate Division. An excerpt from petitioner's brief on this motion, which excerpt is also found in petitioner's brief upon appeal to the Appellate Division, is appended hereto (App.-15). On November 20, 1975, by order of the Court of Appeals of New York State, petitioner's motion for leave to appeal was denied. Said order was entered by the Clerk of the Court of Appeals on November 21, 1975.

Petitioner has now exhausted all the remedies available to him in the courts of the State of New York and seeks review by this Court of the now final determination of the Appellate Division for the Third Judicial Department of the Supreme Court of New York State.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. This case presents squarely the issue of the limits to which a court can go in invoking penalties for failure to disclose without going beyond the bounds of the Due Process Clause of the Fourteenth Amendment.

2. The actions and decisions of the New York State courts at issue in this proceeding have not been in conformance with the opinions set forth in the following decision rendered by this Court: **Hovey** v. **Elliott**, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215; **Hammond Packing Co.** v. **Arkansas**, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Am. Cas. 645; and **Societe Internationale** v. **Rogers**, 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255.

a) This court has held that courts possessing plenary power to punish for contempt can not, on the theory of punishing for a contempt, summarily deny a party the right to defend an action without destroying the fundamental guarantee of due process. **Hovey** v. **Elliott**, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215. In **Hammond Packing** v. **Arkansas**, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, Am. Cas. 645, the Court recognized a distinction between the denial of the right to defend as mere punishment and the denial of such right to punish defendant for the suppression of material evidence in its possession:

> "In the former, due process was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. . . In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material

Reasons Relied on for the Allowance of the Writ

> facts alleged or pleaded were admitted by not answering. . .'' **Hammond, supra,** 212 U.S. at 351.

Where a court strikes a pleading as a sanction for failure to disclose evidence, in order for such striking to be consistant with the guarantee of due process, there must exist a situation wherein the court may reasonably presume that the failure to disclose reflects upon the merits of the allegations to be stricken. That such a presumption does not always arise in event of a failure to disclose was recognized by this Court in **Societe Internationale** v. **Rogers,** 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2d 1255, wherein the Court found that the necessary presumption did not arise since the failure to disclose had ''been due to inability, and not to wilfulness, bad faith, or any fault'' of the non-disclosing party. **Societe Internationale, supra,** 357 U.S. at 212.

The case upon which review is being sought plainly presents a failure of the New York courts to recognize the due process considerations inherent in the striking of petitioner's responsive pleading. Any presumption that the petitioner's failure to comply with the order for discovery and inspection was tantamount to a lack of substantive merits of its asserted defenses and counterclaims was overcome by the salient fact that petitioner's counsel twice tendered the material to respondent with the court's knowledge. Both tenders were made prior to the settlement of the order striking petitioner's answer. Under these circumstances, it can hardly be presumed that petitioner's failure to disclose was indicative of any lack of merit to its defense. Once petitioner indicated a willingness to comply with the order for disclosure, the presumption necessary to preserve due process in the striking of petitioner's answer disappeared. No longer was such action based on the presumption of admission, but rather it constituted a punishment for contempt, denying the petitioner due process of law.

Reasons Relied on for the Allowance of the Writ

b) Even if it is assumed that the presumption of admission was present in the instant case, the order striking petitioner's entire answer with all its affirmative defenses and counterclaims embodied a denial of due process because it was overbroad.

As this court stated in **Hammond, supra:**

> the striking of a pleading finds . . . its sanction in the undoubted right of the law-making power to create a presumption of fact as to the bad faith or untruth of an answer begotten from the suppression or failure to produce the proof ordered, **when such proof concerned the rightful decision of the cause.** 212 U.S. at 350-351 (emphasis added)

In order for the striking of a pleading on account of the pleader's recalcitrance in making disclosure to be within the bounds of the Fourteenth Amendment, there must be some nexus between the stricken pleading and the sought after material. This principal was stated and applied by the New York Court of Appeals in the case of **Feingold** v. **Walworth Bros.,** 238 N.Y. 446, 144 N.E. 675:

> ''When a defendant refuses to produce books and papers relating to the merits of the action, he may be deprived of the right to assert that, as far as they relate to the merits of the action he has a good defense. The presumption arises that a failure to produce such evidence is an admission that it exists. The punishment is for withholding proof, and is properly limited to excluding what the proof presumptively establishes. But to punish generally for a refusal to produce by striking out an entire answer, which not only puts in issue all the material allegations of the complaint, but includes affirmative defenses, comes perilously

Reasons Relied on for the Allowance of the Writ

> near the denial of due process of law. Take, for example, the case where the answer includes affirmative defenses and counterclaims. The defendant, by a failure to make proper discovery going to the merits of the entire action, may be precluded from denying the allegations of the complaint, by striking out his denials; but does any legitimate inference follow from such failure that it has not abundant proof to establish its defenses and counterclaims? The power to punish is limited by the presumption which attaches to the suppression of the evidence suppressed." 238 N.Y. at 454-55.

The instant case presents the exact situation hypothesized by the New York Court of Appeals in the **Feingold** case, **supra**. The petitioner's amended answer (App.-9) sets forth seven separate affirmative defenses. Two of these, the first and seventh, are based solely upon interpretation of contract or statute and involve no fact finding at all. In addition, the amended answer sets forth two counterclaims against the respondent.

As set forth in Judge Pennock's decision to strike the entire answer (App.-2), the issues to which the information requested was relevant were "deemed resolved for the purposes of the action in accordance with the allegations of the complaint. . ." It is clear that any presumptions that arose from petitioner's tardy disclosure were only relevant to the allegations of the complaint and the denial of these allegations by petitioner. No presumption arose as to the affirmative defenses and counterclaims alleged in the amended answer. It is equally clear that the striking of petitioner's entire responsive pleading, as opposed to only striking the denial therein, was an unconstitutional means of punishment for contempt, rather than the legitimate creation of a reasonable presumption.

Reasons Relied on for the Allowance of the Writ

By affirming the action taken by the Supreme Court of the State of New York herein, the Appellate Division has denied the petitioner due process of law. The power to strike petitioner's answer never arose, or, if it did arise, it did so only to a degree limited by considerations of due process of law. "The fundamental conception of a court of justice is condemnation only after hearing." **Hovey** v. **Elliott, supra,** 167 U.S. at 413-14. "The Court must be careful not to become an instrument of injustice, even against a person who has forfeited all claims upon its favor." **Hovey** v. **Elliott, supra,** 167 U.S. at 442-43. The denial of due process by an exasperated state court, even if such exasperation was justified, is surely a matter which this court should consider on review.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

HARVEY AND HARVEY
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Attorneys for Petitioner
Office and P.O. Address
29 Elk Street
Albany, NY 12207
(518) 463-4491

APPENDIX

APPENDIX

DECISION OF APPELLATE DIVISION
THIRD DEPARTMENT

(Reported at 48 A.D. 2d 1018, 373 N.Y.S. 2d 335)

IPPOLITO-LUTZ, INC.,
Respondent

vs.

COHOES HOUSING AUTHORITY,
Appellant

Supreme Court, Appellate Division, Third Department. June 26, 1975. William E. Noonan, Troy, for appellant. Jerrold Morgulas, New York City, for respondent. Order and judgment, Supreme Court, Albany County (Pennock, J.) entered on May 22, 1967 and July 18, 1967 respectively, affirmed, without costs. No opinion.

HERLIHY, P.J., and GREENBLOTT, KANE, LARKIN and REYNOLDS, J.J., concur.

MEMORANDUM OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK

County of Albany

IPPOLITO-LUTZ, INC.,

Plaintiff

against

COHOES HOUSING AUTHORITY,

Defendant

(Supreme Court, Albany County Special Term)
(December 9, 1966)
(Calendar #130)

(Justice John H. Pennock, presiding)

Appearances:

M. Carl Levine, Morgulas and Foreman, Esqs., Attorneys for Plaintiff, 708 Third Avenue, New York, New York.

Murphy, Aldrich, Guy, Broderick and Simon, Esqs., Attorneys for Defendant, 297 River Street, Troy, New York.

Pennock, J.:

This is a motion to set a date for discovery and inspection.

The defendant has failed to comply with a prior order of this court. The defendant was obliged by the prior order of this court to produce the records within twenty days. No valid excuse has been offered by the defendant for its failure to comply and certainly ignoring an order of the court is willful under the circumstances. Otherwise the orderly process of the administration of justice pursuant to the rules would be abandoned. The present attorney for the defendant first appeared on this motion and indicated to the court that immediate steps would be taken to comply with the order. This he has failed to do in the last five months.

Memorandum

The claims of the plaintiff have been in a state of limbo for years and the defendant has been uncooperative and has failed to comply with an order of this court of July 25, 1966. Therefore, the court determines that the issues to which the information was requested is relevant and shall be deemed resolved for the purposes of the action in accordance with the allegations of the complaint, and the court determines that a motion is granted to strike the answer of the defendant. (Section 3126 CPLR.)

Plaintiff to submit order in accordance with this determination.

Dated: May 11, 1967

ORDER APPEALED FROM

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Third Judicial Department at the Justice Building in the City of Albany, New York commencing on the 12th day of May, 1975.

PRESENT:

HON. J. CLARENCE HERLIHY,
Presiding Justice,
HON. LOUIS M. GREENBLOTT
HON. T. PAUL KANE
HON. JOHN L. LARKIN
HON. WALTER B. REYNOLDS
Associate Justices.

NEW YORK SUPREME COURT
APPELLATE DIVISION — THIRD JUDICIAL DEPARTMENT

IPPOLITO-LUTZ, INC.,
Plaintiff-Respondent,

against

ORDER

COHOES HOUSING AUTHORITY,
Defendant-Appellant.

Cohoes Housing Authority, Defendant-Appellant, having appealed from a judgment of the Supreme Court of Albany County entered on the 18th day of July 1967 in the office of the Clerk of the County of Albany and from an order of the Supreme Court of Albany County dated May 22. 1967 (Pennock, J.), and said appeal having been presented during the above stated term of this Court and having been argued by William E. Noonan, Esq., of counsel for the Defendant-Appellant and by Jerrold Morgulas, Esq.,

Order Appealed From

of counsel for the Plaintiff-Respondent and after due deliberation the Court having rendered a decision on the 26th day of June, 1975,

NOW on motion of M. Carl Levine, Morgulas & Foreman, attorneys for Plaintiff-Respondent, it is

ORDERED that the order of the Supreme Court Albany County (Pennock, J.) entered on the 22nd day of May, 1967 be and the same is hereby and in all respects unanimously affirmed and it is further

ORDERED that the judgment of the Supreme Court Albany County entered on the 18th day of July, 1967 be and the same is hereby in all respects unanimously affirmed.

ENTER

JOHN J. O'BRIEN
Clerk

DATED AND ENTERED: July 1, 1975.
A TRUE COPY
JOHN J. O'BRIEN
Clerk

ORDER OF COURT OF APPEALS
STATE OF NEW YORK, COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twentieth day of November A.D. 1975

Present, **HON. CHARLES D. BREITEL, Chief Judge,** presiding.

IPPOLITO-LUTZ, INC.,

Respondent,

vs.

COHOES HOUSING AUTHORITY,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

JOSEPH W. BELLACOSA
Clerk of the Court

COMPLAINT

SUPREME COURT OF THE STATE OF NEW YORK
County of Abany

[Same Title.]

Plaintiff complaining of the defendant, by M. Carl Levine, Morgulas & Foreman, its attorneys, alleges:

1. That at all times hereinafter mentioned, plaintiff was and is a corporation duly organized and existing under and by virtue of the laws of the State of Connecticut, and authorized to do business in the State of New York.

2. That at all times hereinafter mentioned, the defendant was and is a corporation organized under the Public Housing Law of the State of New York.

3. That heretofore and on or about the 27th day of May, 1960, plaintiff and defendant entered into a contract, whereby plaintiff agreed to furnish all the labor and material, plant, tools and equipment required for the general construction of Contract No. 1, which contract is known as Cohoes Housing Project NY 22-1, at Cohoes, New York; and plaintiff incorporates said contract by reference herein and begs leave to refer to same upon the trial with the same force and effect as if set forth at length herein.

4. That said contract between plaintiff and defendant was duly entered into after due advertisement for bids therefor, and upon public letting and in complete compliance with the provisions of the Public Housing Law of the State of New York.

5. That thereafter plaintiff duly entered upon the performance of said contract and duly performed all the terms and conditions thereof on its part to be performed, except that plaintiff was prevented from completing the contract within the time therein provided, because of the illegal actions and breaches by the defendant, as more particularly hereinafter set forth.

Complaint

6. That the defendant breached its aforesaid contract, in that it has failed to pay to the plaintiff the balance due it under the contract and orders issued in connection therewith in the sum of $78,124.95.

7. That the defendant further breached its aforesaid contract, in that it improperly and illegally issued stop orders to the plaintiff, illegally and improperly interfered with and obstructed the plaintiff in the performance of its work, required plaintiff to stop work for long periods of time, required plaintiff to do work not called for or contemplated by the contract, plans, or specifications, failed and refused to pay for work ordered by the defendant in addition to and beyond that required by the contract, all to plaintiff's damage in the sum of $250,695.06.

8. That pursuant to the provisions of law in such cases made and provided, plaintiff duly presented the aforesaid claim, in writing, to the defendant for adjustment, and more than thirty days have elapsed since the presentation of said claim, but the defendant has failed and refused to make any adjustment or payment thereof for more than thirty days after such presentation.

9. That there is now due and owing by the defendant to the plaintiff the sum of $328,820.01, no part of which has been paid.

WHEREFORE, plaintiff demands judgment against the defendant for the sum of $328,820.01, with interest thereon, together with the costs and disbursements of this action.

M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for plaintiff

AMENDED ANSWER

STATE OF NEW YORK, SUPREME COURT,
County of Albany

[Same Title.]

Defendant, through its attorney, John F. Kelly, for an amended answer to the plaintiff's complaint, respectfully alleges:

1. Denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph No. "1".

2. Admits the allegations contained in Paragraphs Numbered "3" and "4".

3. Defendant denies that the plaintiff duly performed all of the terms and conditions of said contract on its part to be performed, and specifies that the plaintiff has failed to perform and complete its contract in that there still remains to be built, repaired, corrected and rebuilt certain items, all as set forth in Exhibit "A", a copy of which is hereunto annexed and made a part hereof.

4. Denies each and every allegation contained in Paragraphs numbered "6", "7", "8" and "9" of plaintiff's complaint, and more specifically and particularly alleges that plaintiffs have failed, neglected and refused to perform, and there have not occurred, the conditions precedent in the contract alleged in paragraph 5 of the complaint which are hereinafter more specifically and particularly set forth in the "Second" affirmative defenses hereinafter in this answer pleaded, each and every allegation whereof is hereby referred to and herein incorporated as if the same were more fully and at length set forth herein.

Amended Answer

As and for a first, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

5. That said contract document executed on the 27th day of May, 1960, between the plaintiff and the defendant herein contained a specific provision, to wit, Section 13b of the General Conditions, as follows: "No payment or compensation of any kind shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable."

As and for a second, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

6. That the plaintiff has failed to comply with the requirements of Paragraph 9d, General Conditions in that plaintiff has not furnished the Local Authority with a release in satisfactory form of all claims against the Local Authority arising under and by virtue of this contract and further that the work required under said contract has not been completed or accepted by the Local Authority or the Public Housing Administration and further has not been certified as completed by the Architect.

As and for a third, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

7. That the plaintiff has failed to provide to the defendant releases or receipts from all persons performing work and supplying material to plaintiff, notwithstanding a demand therefore.

As and for a fourth, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

8. That the requirements of Section 10 General Conditions have not been complied with in that the approval of the Local Authority, the Architect and the Public Housing

Amended Answer

Administration have not been obtained all of which is required by said Section 10 of the General Conditions as a condition precedent to payment for any changes in the work.

As and for a fifth, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

9. That the plaintiff has wholly failed to comply with any or all of the provisions of Section 15, General Conditions with reference to disputes, of the contract referred to in Paragraph 3 of the complaint herein in that plaintiff has failed to submit its claim and proof in detail.

As and for a sixth, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

10. That by virtue of the provisions of the General Conditions, Article 9, Subdivision (b), the defendant is entitled to retain a portion of the contract price until final completion and acceptance of all work covered by the contract.

As and for a seventh, separate, complete and affirmative defense to plaintiff's complaint, defendant alleges:

11. That Section 157 of the Public Housing Law of the State of New York provides as follows:

"1. In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand claim or claims upon which such action or special proceeding was founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

Amended Answer

As and for a counterclaim herein the defendant respectfully alleges:

The defendant reiterates each and every allegation contained in Paragraphs 2, 3 and 4 of the plaintiff's complaint herein with the same force and effect as if the same were set forth fully at length.

That Article 3 of the Special Conditions entitled "Liquidated Damages" provides as follows:

"(a) As actual damages for any delay in completion are impossible of determination, the contractor (except for lawns and planting work) and his sureties shall be liable for and shall pay to the Local Authority the sum of $100. as fixed, agreed and liquidated damages for each calendar day of delay until the work is completed or accepted."

That the plaintiff has failed to complete his contract within the allotted time of 540 days in that he has exceeded said time by 270 days, resulting in damage to the Housing Authority of $27,000. all as provided in said contract.

As and for a second counterclaim herein defendant respectfully alleges:

1. That it reiterates each and every allegation contained in Paragraphs 2, 3 and 4 of the plaintiff's complaint with the same force and effect as if the same were set forth fully at length herein. That contrary of the provisions of said contract between the plaintiff and the defendant the plaintiff has failed to provide temporary heat, watchmen service and specified framing and has failed to build, correct and repair each and every item set forth heretofore in Exhibit "A", all to the damage of the defendant in the sum of $150,000.

Amended Answer

WHEREFORE defendant demands that the complaint of the plaintiff be dismissed and further that the defendant have affirmative judgment in the sum of $177,000. together with the costs and disbursements in this action.

JOHN F. KELLY
Attorney for Defendant

ORDER OF SUPREME COURT OF NEW YORK STATE

At a Special Term Part of the Supreme Court of the State of New York, held in and for the County of Albany, at the Albany Courthouse, on the 22nd day of May, 1967.

Present:
Hon. John H. Pennock, Justice.

[Same Title.]

Upon plaintiff's notice of motion dated November 21, 1966, the affidavit of Jerrold Morgulas, duly sworn to the 21st day of November, 1966, in support of said motion for an order pursuant to Rule 3126 of the Civil Practice Law and Rules, striking defendant's answer for failure to comply with a prior order of this Court directing defendant's compliance with a notice to produce and for discovery and inspection, served under date of January 17, 1966, and upon the affidavit of William E. Noonan, Esq., duly sworn to the 1st day of December, 1966 in opposition thereto, and said motion having come on duly to be heard before me on the 9th day of December, 1966, and due deliberation having been had thereon, and a decision in writing having been made and dated May 11, 1967, it is

On motion of M. Carl Levine, Morgulas & Foreman, attorneys for plaintiff.

ORDERED, that the answer of the defendant, Cohoes Housing Authority, be and the same is hereby stricken and it is further

ORDERED, that plaintiff have judgment against the defendant in the sum of $328,820.01, as demanded in the complaint, with interest from March 20, 1963.

ENTER

JOHN H. PENNOCK
J. S. C.

EXCERPT FROM PETITIONER'S LOWER COURT BRIEF

Section 3126 CPLR speaks only of a refusal to obey an order for disclosure or a wilful failure to disclose information which a court finds ought to have been disclosed, and provides alternate avenues of relief, the most drastic of which is the striking of a pleading. Based upon what we have heretofore said and upon the matters set forth in the record on appeal, we say that there is absolutely no evidence of wilfulness or intended disobedience, or intended refusal to obey the order for disclosure. As we have said before, this contest was a "hot" one, made so only by way of the zeal and desire upon the part of the plaintiff's attorneys as well as attorneys who preceded the writer of this brief, to adequately and fully protect and advance the legal rights of their respective clients. The absence of any wilfulness or disobedience on the part of the defendant Housing Authority itself, is certainly evidenced by the fact that they had no notice of the matter whatsoever, and it is important to bear in mind that there had been a complete change in the membership of the governing board of the Housing Authority between the time that this lawsuit was begun and the time when Justice Pennock ordered the disclosure. Had this writer known of the requirement to produce for discovery and inspection, it would have been just as easy to produce the hand truck full of records at any time agreeable to the plaintiff's attorneys, for it is evident that everything sought to be discovered was twice produced in court — once, on the 9th day of December, 1966, at a special term, and again, on the 22nd day of May, 1967, when the examination before trial of the defendant, through its former executive director, John F. Kelly, Esq., was to be conducted.

It has been said that Courts are loathe to invoke such a drastic penalty as was here invoked, and it seldom has been done, because it is the general policy of our Courts to favor the disposition of controversies on the merits rather

than to impose, as was done in the instant case, the maximum punishment permitted under our practice, that is, the striking of an answer in a substantial case and the ordering of a default judgment in the amount of $371,512.52 against a public housing corporation.

Feingold v. Walworth Bros., 238 N.Y. 446

Even when a presented factual situation strongly suggested that the defendant's conduct was purposeful when he failed to appear for an examination before trial, the First Department Appellate Division refused to sanction the drastic remedy of striking an answer.

Nomako v. Ashton, 22 A.D. 2d 683

In the instant case the defendant Public Housing Authority, whose executive director and attorney and whose trial attorney had no actual notice of the order for discovery and inspection, has had its answer stricken and a substantial judgment entered against it without ever having its day in court for a true test on the merits. We say that in the absence of actual notice and knowledge, evidence of wilful disobedience of a known order or a failure to produce under circumstances clearly deliberate and contumacious, that the Court erred as a matter of law in ordering the striking of an answer and the entry of a default.

DuBois v. Iovinelli, 15 A.D. 2d 616;
Mills v. Copello, 6 A.D. 2d 841;
Mack v. Edell, 284 App. Div. 1022;
Page v. Lalor, 24 A.D. 2d 883;
Balsam v. Frank Nicolosi Building Co., 36 A.D. 2d 533;
Cinelli v. Radcliffe, 35 A.D. 2d 829;
Thornlow v. Long Island R.R. Co., 33 A.D. 2d 1027;
Goldner v. Lendor Structures, 29 A.D. 2d 978;
LaManna Concrete v. Friedman, 34 A.D. 2d 576.

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

—against—

IPPOLITO-LUTZ, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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COHOES HOUSING AUTHORITY,

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Statement of the Case

Unpleasant as it is to have to say so, petitioner's "Statement of the Case" is an almost total misrepresentation of the facts. One can only assume that the gross disregard for the record which is manifest on literally every page of the petition herein is the result of the fact that petitioner's present counsel is the *fourth* firm to represent it since the inception of these proceedings. As this Court will note, there is not a *single record reference* to be found in petitioner's "Statement of the Case." The rules of this Court do not *require* that the record be filed with a petition and it is easy to see why petitioner has availed itself of the

privilege of *not* filing, for almost none of the statements made at pages 8-12 of its petition can be supported by the actual record. To make matters worse, we have been through precisely this same ritual three times already, twice before the Appellate Division, Third Department, and once before the Court of Appeals of the State of New York. To find petitioner repeating this grotesque charade yet a fourth time is simply appalling.

As will be seen, *infra,* petitioner's application for a writ of certiorari is based upon "facts" *which are not "facts" at all* and *do not* appear anywhere in the record which was before the courts of the State of New York. In order that this Court be under no misapprehension as to what actually happened the Record on Appeal before the Appellate Division, Third Department is being filed simultaneously with this memorandum. As this Court will readily see, most—if not all—of the "facts," upon which petitioner relies, took place, *if they took place at all* (and one has no way whatever of knowing whether they ever happened or not) *after* the motion to dismiss petitioner's answer had already been submitted and was awaiting decision and outside of the presence of respondent and its counsel.

The true facts of the case, as they actually appear in the filed record, present an entirely different picture than that presently purveyed by petitioner.

This action was brought by the respondent, Ippolito Lutz, Inc. (contractor for general construction), against the petitioner, Cohoes Housing Authority, to recover (a) the contract balance due of approximately $78,000 and (b) the substantial costs it sustained by virtue of a change in the foundation design affecting half of the project. This

redesign was necessitated by the discovery that the sub-soil conditions were not as depicted on the plans and specifications but were, to put it bluntly, akin to a swamp. The project was held up for eleven months while the petitioner tried to decide how to cope with the problem without using piles and pile-drivers (which would have immediately advertised the fact that the site, purchased by the petitioner from a relative of one of the local political figures, was a quagmire). Finally, *eleven months later,* there being no other way out, the petitioner agreed to proceed just as the respondent had told them they had to proceed within two weeks after the condition had been discovered. This delay of eleven months, plus the costs of going from footings to piles, constituted the second branch of respondent's claim.

From the very outset of the litigation, the petitioner attempted to obstruct respondent in every way it could. The record is one long list of refusals to comply on a voluntary basis with the simplest, most ordinary pre-trial procedures, of consistent refusals to obey court orders compelling compliance, and of constant *ex parte* applications for lengthy adjournments and extensions. It is against *this* background that the final motion which resulted in the dismissal of the petitioner's answer must be viewed.

Shortly after joinder of issue, respondent served a Demand for a Bill of Particulars of the petitioner's defenses and counterclaim. The petitioner ignored the Demand, forcing respondent to move for an order compelling compliance. This took place in March of 1966. On the petitioner's *ex parte* application, the motion was adjourned to June 3, 1966. It was then orally argued and an order was issued a week later compelling compliance by petitioner within 60 days. A bill of particulars was served by the

petitioner on August 9, 1966. It was totally inadequate. Another motion, this time for a final order of preclusion, was immediately made (August 26, 1966). The motion was adjourned on the petitioner's request to September 9, 1966, and submitted on that day. Again, proceeding *ex parte,* and without respondent's knowledge, the petitioner made an application for an additional two month's time to submit reply papers. The motion was finally decided and a second order compelling compliance was issued.

In the meantime, respondent sought to examine the contracting officer of the petitioner. The notice to examine was also ignored by the petitioner, thereby necessitating a motion. A motion to examine this individual (John F. Kelly) was made returnable on December 27, 1965; it was adjourned to January 14, 1966 and resulted in an order of the Court dated April 25, 1966 directing his appearance. Kelly, who was at that time still an officer of the petitioner, was not produced.

On January 17, 1966, respondent served a Notice for Discovery and Inspection. The notice was also ignored by the petitioner, which thereafter moved (after its time to do so had expired) to vacate the notice and obtained a temporary stay. On July 25, 1966, after issuing a decision in which it held that all of the items requested were relevant to the issues raised and properly the subject of discovery, an order was entered directing the petitioner to comply within 20 days. The petitioner ignored this order.

Previously, on January 19, 1966, respondent had also served a Notice to Admit upon the petitioner. By Order to Show Cause dated February 8, 1966, the petitioner moved for enlargement of its time to reply until April 15, 1966.

The motion was not decided by Special Term until July 13, 1966, almost two months after the time which the petitioner had sought, at which time an order (July 25, 1966) was issued directing the petitioner to comply within 20 days. The order was served on July 26, 1966. The petitioner ignored this order, defaulted and did not serve any answers whatever to the Notice to Admit.

Despairing of being able to proceed with the normal pretrial procedures, respondent again attempted to obtain compliance with its Notice for Discovery Inspection. Special Term had already entered an order on July 25, 1966, directing the petitioner to comply within 20 days. This order had been ignored. Respondent attempted to obtain a date for discovery, but the petitioner, despite the outstanding order of compliance, *refused* to comply. At this time, the petitioner was being represented by its second attorney, one John A. Brady, Esq. (John F. Kelly by then having been relieved of his position both as contracting officer, counsel and Executive Director). The order of Special Term (July 26, 1966) directing compliance within 20 days had been served immediately on the petitioner's new counsel (R. 30).* During the Summer of 1966, the respondent's counsel had been advised by Mr. Brady that it was likely that he would relinquish his position as counsel for the petitioner and that one William E. Noonan, Esq. would be substituted in his stead. Although no formal stipulation of substitution had been served (nor any other formal notice of pending substitution, for that matter) a copy of Special Term's order of July 25, 1966 was also served upon Mr. Noonan's office (on July 26, 1966) as a courtesy. Mr. Noo-

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* References are to Record on Appeal to the New York Supreme Court, Appellate Division, Third Department.

nan did not raise any contention as to non-service (R. 31) as indeed he could not.

From July 25, 1966 to November 21, 1966, the petitioner continued to refuse to make its records available for discovery and inspection. It should be noted that all during this time, the petitioner also continued in default both with respect to the order compelling compliance with respondent's notice to admit and with respect to the order directing it to produce Mr. Kelly for examination.

Respondent then moved for a final order striking the petitioner's answer for failure to comply with the prior order of the Court compelling disclosure (discovery and inspection of its records). This motion was brought on in Special Term on December 9, 1966. The motion was submitted without oral argument. In its answering affidavit, the petitioner's then attorney, Noonan, stated that the petitioner would promptly arrange to comply.

Petitioner's present attorneys (Harvey & Harvey, Esqs.) now contend (p. 8, Petition) that on December 9, 1966, "petitioner's counsel (Noonan) had available the documents sought through discovery". *This is simply not true; nor does the record in any way support that statement.* The Justice at Special Term reserved decision on respondent's motion, to give the petitioner a chance to comply and purge itself, but not a word was heard thereafter from the petitioner. The petitioner *did not* communicate with respondent's counsel and offer to produce the documents covered by the prior order. In fact, although respondent's counsel telephoned innumerable times in an attempt to obtain some relief, not one of those calls was answered.

Petitioner now states (p. 9, Petition) that "in the ensuing weeks, petitioner's counsel attempted to arrange a date for the examination before trial, at which time the documents would be presented to respondent's counsel". This statement is both untrue and irrelevant. The "examination" to which petitioner is apparently referring is that of Mr. Kelly who had, as of that time, not yet been produced; a motion had been made, also returnable on December 9, 1966, asking the Court to fix a date for Kelly's examination as a material witness inasmuch as he was no longer connected with the petitioner (notwithstanding the prior order directing that the petitioner submit him for examination which order had been ignored until such time as he had left the petitioner). This motion had *nothing whatever* to do with the motion to strike the petitioner's answer for failure to comply with the prior order for discovery and inspection.

Kelly's examination was sought as a material hostile witness because he was no *longer under* the control of the petitioner and was subpoenaed directly.

Whether petitioner is now confusing these two separate and distinct matters intentionally or not is of no particular importance; what *is* important is that petitioner's statement that its then counsel "attempted to arrange a date for the examination before trial, at which time the documents would be presented" is absolutely untrue.[1] There is not a shred of substantiation for such a statement in the record or out of it, and the facts are exactly the opposite of petitioner's present contentions.

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[1] Petitioner's counsel had nothing to do with Kelly's examination or with producing Kelly. Kelly was, in fact, at that time suing the Authority himself for legal fees. The documents sought by petitioner's discovery motion were completely independent of Kelly's examination and there was never any suggestion whatever that they were related.

During the five months that elapsed between the submission of respondent's motion on December 9, 1966 and Special Term's decision on May 11, 1967 (striking the petitioner's answer) the petitioner not only did not "attempt" to arrange compliance but, quite the contrary, remained in default of all of the prior orders of the Court which had directed compliance with the various notices of examination and notices to admit previously served.

Thus, on May 11, 1967, after giving the petitioner *almost six months* in which to comply and finding that *no attempt whatever* had been made to do so, the Court finally handed down its order striking petitioner's answer. As Special Term pointed out in its opinion (R. 34), "The present attorney for the defendant first appeared on this motion and indicated to the Court that immediate steps would be taken to comply with the order. *This he has failed to do in the last five months.*" (Emphasis added.)

It is at this point that petitioner's recitation of "the case" departs even from the most minimal contact with the record and involves itself with matters which are not only wholly improper but have already been the subject of admonitory court orders twice and of at least three earlier motions.

At the third paragraph of its "Statement of the Case" (p. 9), petitioner begins a story about what its counsel did *after* the motion to strike was decided and the order issued. We are told that petitioner's counsel went to the Special Term judge (without, of course, advising respondent's counsel that he was doing so), and attempted to get an "order to show cause" for reargument signed. He failed in that attempt and then, for some inexplicable reason, did nothing at all. Whether any of this actually occurred,

respondent has no way of knowing. All that can be said for certain is that no order to show cause was ever signed, and that none of this is in the record before this Court.

What comes next is, however, far worse. Petitioner says (bottom of p. 9) that the Justice at Special Term, after having already handed down his decision (May 11, 1967) striking petitioner's answer, told the petitioner's counsel, "to produce Mr. Kelly on May 22, 1967 and to have all records available".[2] There is absolutely nothing in the record to support any such assertion. Does petitioner seriously expect anyone to believe that after handing down an order *striking the petitioner's answer for failure to comply* with its prior order, the Special Term judge would *then* direct petitioner's counsel to produce the records in question and do all of this without advising respondent's attorney? The fact is that it *did not happen* and there is nothing whatever in the record to support such an assertion.

Petitioner also claims that a "hand truck • • • upon which the papers and records sought by respondent were loaded" was delivered outside the Special Term Judge's Chambers on the day the order to strike petitioner's answer was signed. There is absolutely nothing in the record to support such a statement and it is, in fact, untrue. Respondent's counsel was there and petitioner's counsel did indeed have a cardboard carton with him in chambers but, grotesque as it is to have to say it, the only thing visible

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[2] First of all, Mr. Kelly was not, at that time, under the control of the Authority at all, having by then left the Authority's employment. He was, in fact, in litigation himself *with* the Authority. For petitioner now to say that its then-attorney told the Judge at Special Term that the *Authority* would produce Kelly is absurd, untrue and would be utterly irrelevant even if it were true. Moreover, no such statement was ever made to plaintiff or to plaintiff's counsel.

in that box was a pair of galoshes, a small jumble of crumpled papers and an umbrella, nothing more.

Thereafter, a judgment was entered upon the order of Special Term striking the petitioner's answer. The petitioner promptly filed a Notice of Appeal but, in keeping with its prior pattern of conduct, made no move whatever to perfect that appeal.

Under date of August 26, 1968, respondent moved to dismiss the appeal for lack of prosecution. The Appellate Division, Third Department, of the Supreme Court of the State of New York, issued a conditional order (dated September 16, 1968) dismissing the appeal unless it was perfected by the November 1968, Term of Court.

Petitioner thereupon filed its "record" and brief. Much to respondent's surprise, it was discovered that the "record" filed by petitioner contained five affidavits (pp. 37-59) which had not been before the Court at Special Term when the motion was decided. These "affidavits," it transpired, were alleged to be the affidavits which had been offered in support of petitioner's abortive attempt to obtain an order to show cause for reargument. They had never been served on respondent and, indeed, the first time respondent had ever seen them was when they suddenly appeared as part of the purported "record" filed in compliance with the Appellate Division's conditional order of dismissal. Needless to say, the accompanying brief was full of references to the "facts" which appeared in these spurious affidavits.

Respondent immediately moved to have the affidavits expunged from the record. Before this motion was decided, petitioner conceded the impropriety of its actions and stipulated in writing to remove the offending material from *both* the record and the brief.

Petitioner then physically excised the offending material from the filed records, but *did not revise its brief.* Respondent then was forced to make yet another motion to dismiss the appeal because of petitioner's failure to comply with its stipulation and remove the parallel passages still in its brief, all of which—in substance—repeated the material in the affidavits.

While this motion was pending, the New York City office of Housing and Urban Development (HUD) entered the picture and requested that respondent attempt to negotiate a settlement of the case. Notwithstanding the fact that respondent had, at that point, a judgment against the petitioner, respondent agreed to sit down and negotiate. For the next *five years,* respondent opened its books, records, and offices to a succession of auditors, investigators and consultants, one of whom replaced the other with frightening rapidity. Each time negotiations resumed, there were new faces. Each time, respondent was forced to go back and start at the beginning. Finally, when it became obvious that HUD was not negotiating in anything remotely resembling good faith (its last suggestion having been a figure below what was owed on the contract balance alone), respondent determined to press forward.

The second motion to dismiss respondent's appeal, which had all this time been adjourned because of the ongoing, if fruitless, talks with HUD, was now brought to a head. Under date of May 6, 1975, the Appellate Division, Third Department, issued an order dismissing the appeal unless the petitioner complied with its stipulation and removed the offending material from its brief.

The petitioner refused to do so.

When the appeal was called for argument before the Appellate Division, Third Department, this brazen failure of the petitioner to comply with the Court's order was pointed out. The Court acknowledged the petitioner's failure but heard argument nevertheless. Argument then proceeded completely *dehors* the record (as far as petitioner was concerned) in much the same fashion as had the argument in the brief.

On June 26, 1975, the Appellate Division, Third Department, unanimously affirmed the lower court's decision without opinion. Petitioner thereupon moved for (a) reargument and (b) for leave to appeal to the Court of Appeals. Lo and behold, the same affidavits which petitioner had stipulated were improper and should be expunged from the record and brief, now made their appearance yet again.

On August 21, 1975, the Appellate Division denied both motions.

Petitioner then moved directly before the Court of Appeals for leave to that tribunal. And *again*, the spurious material became a part of the papers. Notwithstanding that the rules of the Court of Appeals of the State of New York specifically provide that a motion for leave to appeal shall be based upon *a copy of the record before the Court below*, the petitioner chose to compile its own, brand new, "record"—a bizarre document consisting of a mixture of the affidavits which had been before Judge Pennock, the five affidavits which had *not* been before Special Term, and—for some unknown reason—the Court's order directing John F. Kelly to appear for examination.

On November 20, 1975 the Court of Appeals denied petitioner's motion for leave to appeal.

Since that time, the petitioner, in addition to making the instant petition, has not only refused to pay the judgment but has claimed that it is exempt from enforcement of any such judgment by virtue of various pledges it has given to the United States of America in connection with its financing arrangements with the Public Housing Administration (PHA) and, then, HUD.

ARGUMENT

POINT I

The federal cases cited by petitioner in support of its application do not in any way—under the facts of this case—require the granting of a writ of certiorari by this Court.

The case of *Hovey* v. *Elliot*, 167 U.S. 409, 17 S. Ct. 841, 42 L. Ed. 215, which petitioner cites at p. 13 of the petition, and upon which it places great reliance, does not at all support petitioner's argument. That case did not involve the striking of an answer for failure to comply with a disclosure order or anything remotely like that. In *Hovey*, the defendants, McDonald and White, had been directed by the Court to "pay over to the registry of the Court" the sum of $49,297.50 (op. cit., p. 411) which represented funds previously paid them by a receiver of certain claims settlements (the details of which are in no way relevant). The defendants disobeyed that order and complainants moved to punish "for disobedience of the order as for a contempt". This Court held, in a long and very detailed opinion, that the lower court could not, without violating the due process requirements or the Constitution, punish the *con-*

tempt of an order of the nature there involved by striking the defendant's answer.

In *Hammond Packing Co.* v. *Arkansas,* 212 U.S. 322, 29 S. Ct. 370, L. Ed. 530, from which petitioner quotes at length (Pet., p. 13), this Court made quite clear the distinction between a denial of a right to defend as a mere punishment for contempt and the same sanction when employed as a punishment for the suppression of material evidence in defendant's possession. As this Court said, the striking of an answer is not violative of the due process guarantee where it is the result of, "the refusal to produce material evidence [which] was but an admission of the want of merit in the asserted defense".[3]

The defenses asserted by petitioner were seven in number.

The first defense was predicated on a clause in the contract exculpating the petitioner from any damages for delay. Early in this litigation, petitioner moved for summary judgment urging this clause as a bar. That motion was denied and the denial affirmed by the Appellate Division, Third Department (22 A.D.2d 990, 254 N.Y.S.2d 783 (1964)) which pointed out in its opinion that under New York law such provisions did not insulate a party from delay caused by its own affirmative acts or negligence.

The second defense urged a failure to supply releases of all claims against the petitioner and absence of the architect's certification of completion. The releases were in fact

[3] That the material sought by respondent's discovery order was essential to and inextricably involved with petitioner's defenses was, of course, determined on petitioner's motion for a protective order. We will briefly review those defenses and the items of information sought so that this Court can see the direct connection for itself.

furnished (see Point III, *infra*), and the work subsequently certified as acceptable by the architect.

The third defense simply reiterated the failure of respondent to supply releases from its subcontractors, something it could not have done at the time precisely because petitioner had wrongly refused to pay over the contract balance. Subsequently, and as a result of petitioner's fraudulent conduct (see Point III, *infra*), respondent borrowed money to pay the subcontractors and *did* supply the releases.

The fourth defense alleges a failure to state in the complaint that 30 days have elapsed since the claim was presented to the petitioner for adjustment and that the petitioner has neglected or refused to make adjustment or payment. *Exactly such a statement* appears at ¶8 of the complaint (R. 7). The defense is totally spurious.

The items sought by respondent's original notice to produce were as follows:

1. Original foundation plans for the Polo Grounds and Saratoga sites.

2. All borings and boring plots and plans prepared for or under the direction of the defendant and covering the project sites.

3. All reports on subsurface investigations, strata analyses and underground condition reports prepared for, by or under the direction of defendant and covering the aforementioned project sites.

4. All submissions of proposed foundation revisions.

5. All interim revisions of foundation drawings whether formalized or not.

6. All correspondence between defendant and its architect and/or engineer, dealing with foundation revisions.

7. All stop-orders issued by defendant to plaintiff.

8. All correspondence accompanying the stop-orders.

9. All requisitions for partial payments submitted by plaintiff to defendant.

10. All worksheets, calculations and tabulations prepared by or under the direction or at the request of defendant with regard to requisitions submitted by plaintiff.

11. All written approvals of requisitions to include all written disapprovals of requisition items and supporting reports or recommendations by inspectors, architects or engineers with regard to such items.

12. Daily Job Reports and Progress Reports kept by anyone in defendant's employ or at defendant's request.

13. Daily Job Progress memoranda kept by the Contracting Officer.

14. All punchlists prepared by, under the supervision of or at the request of defendant.

15. All worksheets and reports supporting items appearing on punchlists.

16. All photographs made of items appearing on punchlists.

17. Laboratory test reports of concrete made at the time of installation of concrete.

18. Laboratory reports of tests of concrete made subsequent to the installation of concrete, but prior to the commencement of this action.

19. Progress schedules prepared by defendant.

20. All daily, weekly and monthly progress reports furnished by defendant to the Public Housing Authority.

21. All requisitions and reports submitted by defendant to the Public Housing Authority.

22. All field notes and inter-office correspondence relating to foundation revisions and concrete testing.

The relevance of the items sought to the issues raised both as to respondent's affirmative claims for increased costs due to the change in foundation design and petitioner's counterclaims for allegedly defective work is, we respectfully submit, at once obvious. As we have pointed out *supra*, the relevance and propriety of the demand was ruled upon by the Court (R. 25) upon petitioner's motion for a protective order, and petitioner took no appeal. It can hardly be argued at this point that the material sought did not constitute evidence material and necessary to the prosecution of the action.

Under the test in the *Hammond* case, *supra,* the striking of petitioner's answer was amply justified. As this Court in *Hammond* pointed out (at p. 347) the order of the Trial Court striking the defendant's answer for failure to produce certain designated books and records would only have been repugnant to the due process clause *if* it had been

issued in the face of a *bona fide* effort to comply with the directive provisions of that order. But, "[A]s the Hammond Company absolutely declined to obey the order • • • it is not within our province to afford relief because of an error of judgment in that respect".

The case of *Societe Internationale* v. *Rogers,* 357 U.S. 197, 78 S. Ct. 1087, 2 L. Ed. 2nd 1255, does not, given the facts of the matter at bar, support petitioner's contention. To be sure, in that case, this Court had before it an order of the District Court which had struck the complaint because of the plaintiff's failure to comply with a prior order of the Court requiring disclosure of various books and records. But the Master's Report, which was part of the record, showed that the production of the records in question had been blocked by the Swiss Government "acting in accordance with its own established doctrines in exercising preventive police power by constructive seizure of the • • • records" (*id.* at 201). There was no showing of collusion between the plaintiff and the Swiss Government. The Master found that the plaintiff had "sustained the burden of proof placed upon it and has shown good faith in its efforts to comply with the production order" (*id.* at p. 201). The District Court struck the complaint notwithstanding these findings.

This Court went on to review the rules announced in both *Hovey* v. *Elliott, supra,* and *Hammond Packing Co.* v. *Arkansas, supra,* and stated:

> "In *Hovey* v. *Elliott, supra,* it was held that due process was denied a defendant whose answer was struck, thereby leading to a decree *pro confesso* without a hearing on the merits, because of his refusal to obey a court order pertinent to the suit. This holding was

substantially modified by *Hammond Packing Co.* v. *Arkansas, supra,* where the Court ruled that a state court, consistently with the Due Process Clause of the Fourteenth Amendment, could strike the answer of and render a default judgment against a defendant who refused to produce documents in accordance with a pretrial order. The *Hovey* case was distinguished on grounds that the defendant there was denied his right to defend 'as a mere punishment'; due process was found preserved in *Hammond* on the reasoning that the State simply utilized a permissible presumption that the refusal to produce material evidence '. . . was but an admission of the want of merit in the asserted defense.' 212 U. S., at 350-351. But the Court took care to emphasize that the defendant had not been-penalized '. . . for a failure to do that which it may not have been in its power to do.' All of the State had required 'was a *bona fide* effort to comply with an order . . . , and therefore any *reasonable showing of an inability to comply* would have satisfied the requirements . . .' of the order. 212 U. S., at 347." (emphasis added) (357 U.S. at 209)

This Court then went on to discuss whether the due process requirement would be violated by striking a complaint because of the plaintiff's "inability despite good faith efforts" to comply and held that, on the record before it, the plaintiff should not have been so penalized.

The facts in the matter at bar are in no way analogous. Petitioner at all times had custody and control of the records in question. At first it resisted producing them and moved to vacate the demand on the fallacious ground that the information sought was not relevant. The Court at Special Term denied petitioner's motion, held specifically

that the documents were indeed relevant and on July 25, 1966 ordered their production. Petitioner refused to comply, and after four more months, respondent moved again for relief. On the return date of the motion, petitioner's attorney apparently "indicated to the Court that immediate steps would be taken to comply with the order" (R. 34). *Five more months* passed during which all attempts to obtain compliance went for naught. All during this time, the judge at Special Term withheld decision. By virtue of other motions brought on, the Court became aware of the fact that petitioner still had not complied despite its promise. Then the Court handed down its decision (May 11, 1967):

> "The defendant has failed to comply with a prior order of this court. *The defendant was obligated by the prior order of this court to produce the records within twenty days. No valid excuse has been offered by the defendant for its failure to comply and certainly ignoring an order of the court is willful under the circumstances.* Otherwise the orderly process of the administration of justice pursuant to the rules would be abandoned. The present attorney for the defendant first appeared on this motion and indicated to the court that immediate steps would be taken to comply with the order. *This he has failed to do in the last five months.*" (emphasis added) (R. 24).

Certainly the record is absolutely barren (as the Court pointed out) of any "excuse" much less any showing of "inability" to comply as was found in *Societie Internationale* (*supra*). There was nothing to prevent petitioner from complying for ten long months, yet out of sheer intransigence it chose not to do so. Petitioner cannot, under

the facts of this case, invoke the holding in *Societie Internationale* for its benefit. That decision is, in fact, strong authority *in support* of precisely the action taken by the Courts of the State of New York.

POINT II

The New York cases cited in the appendix to the instant petition do not in any way support petitioner's contentions; they are wholly distinguishable on their facts and set forth a basic rule of law which, when applied to the facts of the instant case, amply supports the action taken.

Petitioner places a great deal of emphasis on the case of *Feingold* v. *Walworth Bros., Inc.,* 238 N.Y. 446 (1926). That case is not on point. Bearing in mind that in the instant case we are dealing with a consistent pattern of obstructionary tactics employed by petitioner and a persistent refusal to produce documents concededly in its possession and of unquestioned relevance to the matters at issue, it is hard to see what possible application *Feingold* can have. In *Feingold,* the Court of Appeals vacated two judgments. The first was vacated because, as the Court was at pains to point out, it was clearly improper to strike the answer of the *individual* defendants when the order of disclosure which had been disobeyed had not been directed to them in the first place. As to the second judgment, against the corporate defendants, the Court pointed out that there was no evidence whatever that the documents which had been demanded *were even in existence.*

In the case at bar, the order of disclosure was specifically directed to the petitioner and the documents as to which

disclosure was sought were concededly in existence. In short, *Feingold* has nothing whatever to do with the matter at bar.

We will next deal briefly with each of the other cases mentioned on page A-16 of the petition.

It is to be noted in the first instance that a number of these cases arose under a different statutory scheme than that now in effect. Prior to the institution of the Civil Practice Law and Rules, a failure to appear for examination or to comply with other discovery proceeding demands gave rise immediately to a motion to dismiss. Under the present state of the New York State rules two motions are necessary. First a motion must be made for an order compelling compliance with a demand for examination before trial or other discovery proceedings and only when that order has been subsequently violated may a further motion be made to vacate the answer on the ground of a violation of the first order. This is, of course, quite a different situation. The offending party is now given *two bites* of the apple instead of one and the question of "wilfulness" assumes therefore a rather different aspect under these new statutory circumstances. When a party has already been *warned* by the entry of a Court order *directing compliance* with previously flaunted discovery proceedings, a further refusal to comply may hardly be said to be not wilful absent a very strong showing of excusable cause. It may be noted that there is *no showing whatsoever* of excusable cause in the instant record nor was there any attempt by petitioner to explain the fact of its lengthy noncompliance.

With the foregoing by way of background, let us now turn our attention to the specific cases cited by petitioner.

Nomako v. *Ashton,* 22 A.D.2d 683 (1st Dept., 1964) was a case involving defendant's failure to appear for an examination before trial. There is no indication in the information as reported of a prior order directing appearance for examination although the case did arise a few years subsequent to the enactment of the Civil Practice Law and Rules. Furthermore, while the Court did state that as a matter of general policy "disposition of controversies on the merits is favored" it also pointed out that in order to vacate a default judgment under such circumstances there must be a showing of a meritorious defense, excusable default and the absence of wilfulness. It may be noted that petitioner made absolutely no attempt to establish the existence of a meritorious defense, made no explanation of the default and made no showing of an absence of wilfulness.

The case of *Dubois* v. *Iovinelli,* 15 A.D.2d 616 (Third Dep't, 1961), was decided under Section 299 of the Civil Practice Act. The memorandum decision states only that the moving affidavit did not demonstrate the default of the defendant-appellant to be clearly deliberate or contumacious. Such could hardly be said given the record in the instant matter. To put it bluntly, the record in the matter at bar shows quite clearly that petitioner had continually thumbed its nose at every judicial direction to which it was subject. Motion after motion had been made in order to force it to comply with the most fundamental requirements of orderly litigation.

The cases of *Mills* v. *Capello,* 6 A.D.2d 841 (Second Dept. 1958), and *Page* v. *Lalor,* 24 A.D.2d 883 (Second Dept. 1965) both were decided on the basis of an absence of a showing of wilfulness. On the facts revealed by the record it can hardly be said that the refusal to comply was not wilful.

Indeed, it was not only wilful but *continued over a period far in excess of the time given by Special Term in its original order* in which petitioner was to comply.

In *Balsam* v. *Frank Nicolosi Building Co.,* 36 A.D.2d 533, the Court pointed out that the witnesses which defendant-appellant had failed to produce were unavailable, their whereabouts concededly unknown, and that, therefore, defendant's failure to produce them was hardly "willful."

In *Cinelli* v. *Radcliffe,* 35 A.D.2d 829, there is no indication in the opinion of what the underlying facts were, only that a witness had failed to show up for an examination before trial and that the "moving affidavit" had failed to establish that the default was willful."

Thornlow v. *Long Island RR Co.,* 33 A.D.2d 1027 (like *Balsam, supra*), involved a faliure to produce a witness (a former employee) who was not under the defendant-appellant's control. Therefore, the Court held that the failure could not be characterized as "willful."

In *La Manna Concrete* v. *Friedman,* 34 A.D.2d 576 (as in *Cinelli, supra*), the opinion contains no underlying facts at all. Again, the case involved failure of a witness to appear—a situation quite different than a continued refusal over a ten month period to produce records and documents pursuant to a discovery order.

Finally, we come to *Goldner* v. *Lendor Structures,* 29 A.D.2d 978. Just why petitioner cited *this* case is hard to understand for it holds dead against it. In *Goldner,* the lower court had denied plaintiff's application for sanctions (not, it may be noted, involving a request to strike the

answer). The Appellate Division noted that the defendant had failed to appear for an examination before trial three times and held that:

> "In our opinion, defendant's conduct reflected *a pattern of behavior* which was contumacious and tantamount to willful default, *well within the purview of* CPLR 3126 • • •."

If a failure to appear for an examination before trial three times is "contumacious and willful," then how much more contumacious and willful was petitioner's conduct, only the latest in a long and sorry story of obstructionary, dilatory tactics and refusals to comply with orders of the Court; more than enough, we respectfully submit, to warrant the action taken.

POINT III

The striking of petitioner's entire answer, inclusive of its counterclaims, was correct and proper under the circumstances.

Petitioner also argues that, even if a dismissal of the *answer* was proper under the circumstances, the order should not have gone so far as to include the counterclaims. This argument, under the facts of this case, is totally misplaced.

Petitioner's counterclaims were two in number—first, a claim for liquidated damages for delay in the sum of $27,000.00. This claim was predicated on the very same period of "delay" for which plaintiff sought relief, i.e., that period during which approximately one-half the project had been stopped cold by petitioner's own "stop order"

while it tried (unsuccessfully) to figure out how to redesign the foundations without using piles.

The second counterclaim asserted "backcharges" for various defective items. The history of these claims is very instructive and, if anything, serves to highlight the utterly reprehensible conduct in which petitioner constantly engaged.

The items of alleged "backcharges" all involved work of respondent's various subcontractors. Not being paid, because petitioner had withheld payment from respondent on account of these items, various of these subcontractors filed mechanic's liens and a foreclosure action was commenced. As trial approached, the case was conferenced before the Judge at Trial Term. At that conference—at which respondent's counsel was present—respondent pointed out that it could not pay its subcontractors if their work was not accepted by the petitioner. After considerable discussion, in which the fallacy of most if not all of the petitioner's claims were pointed out, the petitioner agreed to have its engineers *re-examine* the work in question and respondent agreed that if, upon re-examination, the petitioner accepted the work of the various subcontractors, respondent would forthwith pay those subcontractors the balance due them and obtain releases of lien, upon receipt of which petitioner promised to release the contract balance (which had been withheld solely on the basis of these alleged charges). All of this was agreed to by the Executive Director of the petitioner in front of the Judge sitting at Trial Term and in the presence of a number of other attorneys.

Thereafter, the engineer's re-examination was held, and the petitioner *accepted* the work of the subcontractors in-

volved, in *writing*. Respondent then went out and *borrowed* the money necessary to pay the subcontractors, did pay them, and obtained releases of the mechanic's liens which it then forwarded to the petitioner.

The petitioner, however, did a sudden about-face, repudiated the agreement it had made and refused to pay respondent although it had accepted in writing the work of the subcontractors against whose work it had earlier asserted its backcharges.

Under the circumstances, it is respectfully submitted that there is not an iota of validity to petitioner's argument with respect to the dismissal of its *entire* answer, inclusive of counterclaims. It may be noted that the documents concerning which discovery was sought were as intimately involved with the alleged "counterclaims" as they were with petitioner's affirmative defenses.

POINT IV

Petitioner's consistent obstructionary tactics, its long history of refusal to obey orders of this Court, and its clear and unexplained flaunting of the order of Special Term directing it to submit to discovery proceedings for a period in excess of five months more than amply mandate an affirmance of Special Term's order striking petitioner's answer.

In the case of *Laverne* v. *Incorporated Village of Laurel Hollow,* 18 N.Y.2d 635 (1966), the Court of Appeals sustained the dismissal of a complaint, in the exercise of sound judicial discretion, where the plaintiff's *totality of conduct* evidenced a clear and wilful failure to purge itself of disobedience. Thus, the Court stated:

"Notwithstanding the lower court's error in determining that plaintiff's motion for a protective order pursuant to CPLR §3103 should have been addressed to the Appellate Division, rather than to the trial court, the court properly dismissed the complaint—in the sound exercise of its judicial discretion—because of plaintiff's willful failure to purge himself of his disobedience of prior court orders compelling disclosure on matters relevant to his causes of action and defenses thereto (CPLR §3126). And while it is true that plaintiff's 3103 motion automatically suspended all disclosure proceedings regarding the particular matter to be disclosed, the making of such a motion did not in any way immunize Laverne from the dismissal of his complaint. The Appellate Division affirmed this dismissal because Laverne's totality of conduct evidenced a willful failure 'to purge himself of his prior disobedience', a factual determination supported by the evidence and beyond the scope of this court's review."

Similarly, in *James* v. *Powell,* 26 A.D.2d 525 (First Dep't 1966) reversed on other grounds, 19 N.Y.2d 249 (1967), the defendant's answer was stricken for failure to appear for examination before trial in accordance with a prior court order. See also *Abazoglou* v. *Tsakalotos,* 36 A.D.2d 516 (First Dep't 1971)—where a similar result was reached and sustained where a prior order of Special Term had directed appearance for examination before trial under CPLR 3126 and plaintiff had failed to comply and also failed to appeal from the order). See also, *Soares, Inc.* v. *Guertzenstein,* 279 App. Div. 744 (First Dep't 1951).

The comment appearing following CPLR Section 3126 in volume 7B of McKinney's Consolidated Laws is most instructive. While this commentary is, of course, not law, it is well worth quoting:

> "Though the adverb 'wilfully' in the statute relates to the disobedience of something other than a court order, it applies as a practical matter to a court order as well. If a disclosure directed by court order can be shown impossible to carry out, a sanction will not be imposed under CPLR 3126. But there is an important difference. If the disclosure was previously directed to be made by a court order, whether by motion under CPLR 3124 or 3103 or any other provision, the disclosability of the datum or thing under the terms of CPLR 3101 and the feasibility of obeying the order were presumably passed upon on that application. Unless that order was made ex-parte, or something occurring afterwards has impeded the disclosure, the findings and conclusions which resulted in that order would be the law of the case (a kind of intra-action res judicata doctrine) and would not ordinarily be reviewed by the judge hearing the CPLR 3126 motion."

It is respectfully submitted that the record more than amply supports the action taken by Special Term in striking petitioner's answer.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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United States Supreme Court

October Term, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

against

IPPOLITO-LUTZ, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES

COHOES HOUSING AUTHORITY,

Petitioner,

against

IPPOLITO-LUTZ, INC.,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner is loathe to enter into an argument over the facts of this case. However, Respondent's Brief contains blatant accusations with respect to the correctness and the propriety of the Statement of the Case contained in the Petition. These groundless accusations necessitate a reply.

The decision of the lower court to strike the petitioner's answer is found in the Memorandum Opinion of the Hon. John H. Pennock, Justice of the Supreme Court, dated May 11, 1967. Pursuant to state court procedure the opinion stated that Judge Pennock would sign an order upon its being submitted to him by the respondent. An order was subsequently submitted and was signed by the Judge on May 22, 1967. Between the time of the rendering of the written decision and the signing of the order, petitioner presented to Judge Pennock an application in the form of a proposed order to show cause for reargument. At page 8 of the Respondent's Brief before this Court it is inferred that such application, without notice, was improper. Not only is this practice acceptable in New York State, but it is the proper practice under the circumstances. The courts have stated:

> The proper practice is to submit to the judge who decided the motion a short affidavit setting

> forth the decision and the asserted ground for reargument and request an order to show cause. If on reading that affidavit the judge thinks there is reason for reargument he will sign the order to show cause. If he reach the contrary conclusion he will refuse it and the matter is ended without an expenditure of the time and labor necessary to put a motion on the calendar, have the parties answer on the return day, and then have the motion referred to the judge who heard the original motion. *Ellis v. Central Hanover Bank and Trust Company*, 1951, 198 Misc. 912, 102, N.Y.S.2d 337; *DeWindt v. O'Leary*, D.C.N.Y. 1954, 118 F.Supp.915.

Petitioner herein appealed to the Appellant Division, Third Department, of the Supreme Court of the State of New York from the judgment entered upon the order of the Special Term striking the petitioner's answer. On that appeal a printed record was filed with the Appellate Division. The contents of this printed record was stipulated to by the parties. Pursuant to the stipulation the papers which had been presented to Judge Pennock in support of the application for reargument were deleted from the record. In its Brief to this Cour at page 12 respondent states that petitioner stipulated that the papers in support of reargument were "improper and should be expunged from the record and brief." This is clearly a misstatement of the stipulation; petitioner at no time stipulated that these papers were "improper". In fact these papers were subsequently presented by petitioner upon a motion to the Appellate Division, Third Department, for reargument and for leave to appeal to the Court of Appeals and also upon a motion to the Court of Appeals of the State of New York for leave to appeal to that court. Respondent made no attempt to have the papers in question deleted from these motion papers and these papers were before the respective courts. (See Respondent's Brief, page 12).

Rule 5(d) of the Federal Rules of Civil Procedure mandates that all pleadings be filed with the Clerk of the District Court.

When there is an appeal it is the duty of the clerk to transmit the record to the appellate court. (Rule 11, Federal Rules of Appellate Procedure.) The Civil Practice Law and Rules of the State of New York does not contain a provision similar to Rule 5(d); pleadings are not necessarily always filed with the clerk of the state court. Accordingly, in New York State it is the duty of the appellant to file the record with the appellate court. (Civil Practice Law and Rules, R.5530.) In preparing the record on appeal, "the parties or their attorneys may stipulate as to the correctness as to the entire record on appeal or *any portion thereof* in lieu of certification." (emphasis added). Thus New York State procedure permits the parties to an appeal to stipulate as to what is the proper printed record for the purposes of the appeal. However, the fact that the respective parties stipulate that a patently insufficient record meets with their approval does not preclude the court on appeal from reviewing what is a proper record. See, *Guarnacci v. Ferguson,* 28 A.D. 2d, 839, 287 N.Y.S. 2d 471.

Attorneys for petitioner and respondent stipulated to the contents of a printed record for the appeal to the Appellant Division, Third Department. Respondent has requested that this stipulated record be transmitted to this Court. (Respondent's Brief, p. 2.) In Respondent's Brief, pages 15-17, there appears the contents of respondent's original notice to produce. Petitioner's alleged failure to comply with this notice to produce was the basis for the court's ultimate determination to strike petitioner's answer. This determination and the subsequent judgment are the subject of the present application to this Court. The notice to produce, which is set forth in Respondent's Brief, is not in the stipulated record which was before the Appellate Division, Third Department. It would be ludicrous to argue that the very notice to produce, which resulted in the striking of petitioner's answer, should not be part of the record of this case. Yet, it was not within the record to which the parties stipulated. Rules 21 and 25 of the Rules of the Supreme Court of the United States provide that a record need not be transmitted to this Court until after certiorari is granted. If the Court grants certiorari in this case, there will be

ample opportunity to have the entire and proper record from the state courts prepared and transmitted to this Court for tis consideration upon the merits.

Respondent argues in his Brief that petitioner has improperly included certain facts within its Statement of the Case which are not supported by the record below. It is difficult to give serious consideration to this argument after reviewing the Statement of the Case contained in Respondent's Brief. This statement is replete with references to various demands having to do with pretrial discovery, with orders from the courts below, with alleged delaying tactics and bad faith negotiation on the part of petitioner, and even with a reference to petitioner's alleged refusal to pay the judgment which is the subject of the Petition before the Court. All of these things smack of the very impropriety of which the respondent accuses the petitioner. None of the statements or allegations of the respondent are substantiated by the record below and are irrelevant to the issues now before this Court.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1161

COHOES HOUSING AUTHORITY,

Petitioner,

—against—

IPPOLITO-LUTZ, INC.,

Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

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Supreme Court of the United States

OCTOBER TERM, 1975

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COHOES HOUSING AUTHORITY,

Petitioner,

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IPPOLITO-LUTZ, INC.,

Respondent.

RESPONDENT'S REPLY BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

Petitioner has made a number of statements in its Reply Brief which are completely at odds with the Record in this case and cannot be allowed to go unanswered.

On page 2 of its Reply Brief, Petitioner contends that the stipulation entered into between Petitioner and Respondent (expunging from the Record certain affidavits which were not properly part of the Record) did not constitute a stipulation that these papers were "improper." This is simply not so. The stipulation was entered into only after Respondent had moved to dismiss Petitioner's appeal in the Appellate Division because Petitioner had placed in the printed record those very four affidavits, none of which had been before the Court when the motion being appealed from was decided. These affidavits had never been served

upon Respondent and of course, Respondent never even had an opportunity to respond thereto. A copy of this stipulation appears as Appendix "A" of this brief.

Petitioner further states in its Reply Brief that when these same affidavits were included in the records before the Appellate Division, Third Department (on motion to reargue), and before the Court of Appeals of the State of New York on Petitioner's motion for leave to appeal, that "no attempt was made to have these papers deleted." This is also not true. There was no motion procedure available by which objection *could* be taken; the only avenue of protest was by way of answering affidavits on each of the aforementioned motions.

Objection *was* taken in the affidavits submitted in opposition in each instance and, in each case, a letter sent to the Clerk of the Court reiterating Respondent's protests. Copies of those letters are annexed hereto as Appendix "B" and "C."

On page 3 of its Reply Brief, Petitioner appears to be arguing that the record before the New York Courts was in some way defective because the original Notice for Discovery and Inspection was not included. The Notice was not a part of the record for the simple reason that it had been part of the record on Respondent's earlier motion for an order compelling Petitioner to comply, at which time the propriety and scope of the Notice had been litigated and a decision rendered by Special Term that the Notice was entirely proper, that the items sought by the Notice were material and necessary to the prosecution of the action, and directing Petitioner to comply immediately therewith. The later motion (which resulted in the striking of Petitioner's

answer) was to punish for failure to comply with this prior order of the Court. The Notice was no longer in question, and was not properly a part of the record. The only issue at that point was Petitioner's blatant refusal to obey the prior order of the Court directing it to comply with the Notice.

Petitioner also appears to be arguing (on page 3 of the Reply Brief) that the stipulation entered into between the parties expunging the affidavits which had improperly been included in the Record by Petitioner was made pursuant to New York State Procedures which permit parties to stipulate to an appendix method of appeal and include only those parts of the record which they deem germane to the appeal. The stipulation in question was not entered into in accordance with any such procedure. It was executed because, in the midst of a motion to dismiss its appeal, Petitioner conceded that it had improperly included in its purported record affidavits which had not been before the Court at Special Term when it reached its decision to strike the answer and which had never been served upon Respondent.

Guarnacci v. *Ferguson,* 29 A.D.2d 839 (4th Dept., 1968) is no authority whatever for Petitioner's contention. In *Guarnacci* the Court simply held that an appeal could not be prosecuted upon a patently insufficient record, from which pertinent portions of the testimony had been omitted by stipulation. The appeal was stricken from the calendar and the appellant directed to file a supplementary record. *Guarnacci* in no way supports Petitioner's apparent contention that affidavits which were *not* a part of the papers before the Court at Special Term when it decided a motion can, under any circumstances, be made a part of the record on an appeal from the decision on that motion.

Lastly, Petitioner points out that Respondent, too, has referred to matters outside the record and that this, somehow, legitimizes Petitioner's own excursions. Indeed, it is hard to see how Petitioner's misstatements and misrepresentations of the record could have been discussed otherwise. We regret the necessity of so doing; Petitioner's own conduct left us no choice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

Stipulation

SUPREME COURT
OF THE STATE OF NEW YORK

COUNTY OF ALBANY

IPPOLITO-LUTZ, INC.,

Plaintiff,

—against—

COHOES HOUSING AUTHORITY,

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that the Record on Appeal, heretofore prepared and copies of which were filed, uncertified, with the Appellate Division, Third Department on the appeal herein shall have omitted and removed therefrom, pages 37 through and including 59, and that all material contained in the Brief of Defendant-Appellant, which refers to the aforesaid omitted and removed material, shall likewise be removed, and that upon presentation of the original of the Record on Appeal which has been amended as aforesaid, the attorney for the plaintiff-respondent agrees to stipulate to its correctness as the Record on Appeal herein, and that the same may thereafter be filed with the Appellate Division, Third Department.

Dated: November 4, 1968

M. CARL LEVINE, MORGULAS & FOREMAN
Attorneys for Plaintiff-Respondent

MURPHY, ALDRICH, GUY, BRODERICK & SIMON
Attorneys for Defendant-Appellant

APPENDIX B

July 29, 1975

Honorable
J. Clarence Herlihy, Presiding Justice
Appellate Division, Third Department
Justice Building
Albany, New York

Re: *Ippolito-Lutz, Inc.* v. *Cohoes Housing Authority*

Dear Judge Herlihy:

The writer regrets imposing on this Court's time by addressing to it a post-motion letter, but the receipt by this office of movant's reply papers one day *after* the motion was marked "submitted" mandates a brief letter.

Predictably, Appellant again argues the question of the five post-motion affidavits. To recapitulate briefly:

The affidavits in question were, concededly, *not* before the Court at Special Term when it decided the Respondent's motion and were, therefore, not a proper part of the record on the appeal from that decision. Appellant so stipulated, after a motion to expunge had been made. Appellant itself then removed the affidavits from the physical record before this Court on Appeal, but did not remove references to and summaries of those affidavits from his brief. Respondent, thereupon moved before this Court to dismiss the appeal and this Court granted that motion, dismissing the appeal unless Appellant removed the material which was the subject of the motion. Appellant did

not appeal that order or make any move to reargue. Rather, Appellant proceeded to place the appeal on the Calendar of this Court, but *without* removing the offending material from its brief—in *direct defiance* of the order of this Court.

Now, Appellant is once again arguing that the affidavits should have been part of the record, and persists in making the same argument that was made before this Court on oral argument. Most of what Mr. Noonan has to say has been fully dealt with in our answering affidavit with only a few additional comments.

When Justice Pennock refused to sign an order to show cause for reargument, Appellant could have proceeded by normal notice of motion. Appellant *did not do this.* Mr. Noonan now says that any further effort would have been "futile" (p. 2 of Respondent's affidavit of July 25, 1975). This is hardly the case. Had a motion to reargue been made and Respondent given, thereby, an opportunity to *reply* to the contents of the affidavits in question), and *then* denied, Appellant could have appealed the denial of that motion and the original motion together, on a full record. This Appellant *did not do.* It can hardly come before this Court *now* and argue that the Court should do for it what it failed to do for itself nine years ago.

On page 3, Appellant now makes an argument (not made on oral argument before this Court (and barely touched on in its brief) that the application of CPLR §3215 to the entry of judgment be reconsidered. The answer to this is brief and simple. First of all, the entry of a default judgment under CPLR §3215 is not appealable *per se* (see

Practice Commentary of David Siegel, McKinney's Consolidated Laws of New York, Book 7B, CPLR §3215, p. 881). The proper and *only* procedure is to move to vacate that judgment under CPLR §3215 and appeal the denial of that motion. Such a motion must be made within *one year* of the entry of the judgment under CPLR §5015(a). This Appellant did not do so, and the time has long since passed to complain about any alleged technical irregularity in the entry of the judgment. Furthermore, the order of Pennock, J. (May 11, 1967) contains the following provision: "Therefore, the Court determines that the issues to which the information was requested is relevant and shall be *deemed resolved for the purposes of the action in accordance with the allegations of the complaint.*"

Accordingly, judgment could be entered by the Clerk without further proceedings, which would have been merely redundant.

Finally, Mr. Noonan refers to the case of *Feingold* v. *Walworth Bros. Inc.*, 238 N.Y. 446, as holding that the "question of whether or not there was sufficient evidence before the Court to warrant the striking of an Answer is a 'matter of law' ". The *Feingold* case announces no such general rule. The issue there was whether the answers of certain co-defendants could be stricken because a certain *other* co-defendant had failed to comply with a discovery order dealing with documents and information wholly within *his* control. That was, indeed, a "question of law", but it has nothing whatever to do with the issues here involved.

It is respectfully submitted that Appellant's motions for "reargument" and for leave to appeal should be denied, in toto, with costs to Respondent.

Respectfully,

M. Carl Levine, Morgulas & Foreman

By Jerrold Morgulas

JM/jmb

cc: William E. Noonan, Esq.
Martin, Noonan, Hislop, Troue & Shudt

APPENDIX C

October 3, 1975

Mr. Jack Gary, Motion Clerk
Court of Appeals
Court of Appeals Hall
Eagle Street
Albany, New York 12207

Re: *Ippolito-Lutz, Inc.* v. *Cohoes Housing Authority*
(Motion For Leave To Appeal)

Dear Mr. Gary:

We are herewith filing, under separate cover, our answering affidavit and memorandum of law in opposition to the motion by Cohoes Housing Authority for leave to appeal to the Court of Appeals.

As I stated to you during our telephone conversation last week, the appellant has included, in the bound document, which he refers to as "Notice of Motion, Moving Affidavit and *Supporting Papers*", a series of affidavits which were *not part of the record on appeal before the Appellate Division, Third Department.* Furthermore, appellant has made copious references to those documents and to the circumstances attendant upon them *in the brief* which he has submitted in support of his motion for leave to appeal. As I stated to you, the appellant had agreed *by written stipulation* dated November 4, 1968, to remove the offending documents from the record and, also, to remove all references thereto from his brief. We enclose herewith a photostatic copy of that stipulation, as ENCLOSURE "A".

Thereafter, appellant did, in fact, finally remove pages 37-59 from the copies of the printed record previously filed in the Appellate Division, Third Department. We are enclosing a xerox copy of our only remaining copy of that record for your easy reference. (ENCLOSURE "C")

Due to the fact that appellant had failed and refused to *remove from his brief* the references to the affidavit appearing on pages 37-59 of the original filed record, a motion was made in the Appellate Division, Third Department, to dismiss the appeal unless appellant did remove the offending references and serve a corrected brief. This motion was granted and an order conditionally dismissing the appeal was entered on May 6, 1975, a copy of which is annexed as ENCLOSURE "B". Appellant *did not,* in fact, correct his brief, and made oral application at the time of argument to be relieved both of the stipulation and the effect of the order of the Appellate Division of May 6, 1975, which application was promptly denied. The Court, thereupon, heard the appeal and affirmed it unanimously.

Now, as part of what appellant has denominated as "Moving Affidavit and Supporting Papers" (at pages 25-41), it has *once again included the offending affidavits.* You will note that the pages, as reproduced, are exact photocopies of the pages of the original record, and still bear the original pagination, clearly showing that they are *pages 39-53* of the original record, precisely those pages *which were removed pursuant to stipulation of November 4, 1968,* the terms of which stipulation were subsequently reinforced by the May 6, 1975 order of the Appellate Division, Third Department, from which, we may note, no appeal was ever taken.

Plaintiff-respondent vigorously protested what we believe to be a gross violation of rules of procedure and the wholly improper inclusion of material which was not part of the record before the Appellate Division, Third Department. Accordingly, we wrote to appellant's attorney, on September 19, 1975 (ENCLOSURE "D"), and demanded removal of the offending material. Appellant has refused to comply.

We note that Court of Appeals Rule 500.9(a) specifically states that a motion for permission to appeal "shall be based on a copy of the record in the Court below". Appellant has completely disregarded the requirement of this rule and, instead of serving "a copy of the record in the Court below" in support of his present motion, has concocted an entire new record for himself and thrust it before this Court as part of his moving papers.

It is respectfully submitted that, under the circumstances and for the foregoing reasons, appellant's motion should be stricken from the calendar.

Very truly yours,

M. CARL LEVINE, MORGULAS & FOREMAN

By: JERROLD MORGULAS

cc: WILLIAM E. NOONAN, Esq.